In the Supreme Court of the United States

OCTOBER TERM 1958

No. .....

SOUTHERN PACIFIC COMPANY, a corporation,
Appellant,

vs.

THE CORPORATION COMMISSION OF ARIZONA and WILLIAM T. BROOKS, JOHN H. BARRY and MIT SIMMS, as members of and comprising said Commission, and THE CITY OF TUCSON, a municipal corporation,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA

MOTION TO DISMISS

Pursuant to paragraph 1(b) of Rule 16 of the Revised Rules of this Court, the Appellees respectfully move that the appeal be dismissed on the ground that it does not present a substantial federal question.

STATEMENT

On March 26, 1955, the Appellee City of Tucson, a municipal corporation (hereinafter called the city), filed a complaint against the Appellant Southern Pacific Company, a corporation (hereinafter called the railroad), with the Appellee Arizona Corporation Commission (hereinafter called the commission) praying that the said commission require the railroad to install and maintain a system of automatic flashing signals at the South Cherry Avenue grade crossing within the corporate limits of the said city, pursuant to Section 69-228, Arizona Code Annotated, 1939[1] (now Section 40-336, Arizona Revised Statutes, 1956) at the cost of the railroad, predicated upon the fact that the public health and safety require such signals. After issue, a hearing was held by the commission on June 15, 1956, at which time evidence was adduced concerning the hazardous nature of the crossing. On July 20, 1956, the commission issued its opinion and order, denominated Decision No. 29784.[2] Thereafter motions for rehearing were filed by both the city and the railroad. On September 6, 1956, the commission issued its amended

---

[1]"69-228. Safety devices, commission may order.—The commission may by order, rule or regulation, require every public service corporation to maintain and operate its line, plant, system, equipment, and premises in such manner as to promote and safeguard the health and safety of its employees, passengers, customers and the public, and to this end may prescribe the installation, use, maintenance and operation of appropriate safety or other devices or appliances, including interlocking and other protective devices at grade crossings or junctions and block or other systems of signalling, establish uniform or other standards of equipment, and require the performance of any other act which health or safety may demand. (Laws 1912, ch. 90, § p. 495; R. S. 1913, § 2318; rev., R. C. 1928, § 699.)"

---

[2]Appendix C of Statement as to Jurisdiction.

opinion and order, denominated Decision No. 29842.[3] Both the order and the amended order required, inter alia, the railroad to construct and maintain two electrically operated flashing warning signals on each side of the said grade crossing facing oncoming traffic at the sole expense of the railroad as authorized by the said statute. On October 15, 1956, the railroad filed a complaint against the Appellees in the Superior Court of the State of Arizona in and for Maricopa County, praying that Decision No. 29784 be vacated and set aside. After issue joined a trial de novo was held on February 19, 1957, resulting in a judgment dated April 22, 1957,[4] affirming Decision No. 29784.

On April 27, 1957, the railroad appealed to the Supreme Court of Arizona from the said judgment of the Superior Court, and, after argument duly had, the Supreme Court of Arizona affirmed the said judgment for the reasons set forth in its opinion dated September 24, 1958.[5] After the railroad's petition for rehearing was denied, this appeal followed.

ARGUMENT

(1) DECISION NO. 29784 REPRESENTS A PROPER AND REASONABLE EXERCISE OF THE POLICE POWER OF ARIZONA

The basis of the instant appeal is that "the improvement will be of substantial benefit to the motoring public using the crossing, as a means of avoiding interference

---

[3]Appendix D of Statement as to Jurisdiction.

---

[4]Appendix B of Statement as to Jurisdiction.

---

[5]Appendix A of Statement as to Jurisdiction.

and delay."[6] and, therefore, in accordance with the principles of *Nashville, C & St. L. Ry. v. Walters*, 1935, 294 U. S. 405, and *Atchison R. Co. v. Pub. Util. Comm'n.*, 1953, 346 U. S. 346, the expense of the improvement should be fairly and reasonably allocated. The premise of the railroad is that the improvement is to reduce traffic delays, such as in the *Nashville* and *Atchison* cases, which dealt with grade separation problems. The railroad fails, however, to recognize that the instant case involves not a question of the improvement of public facilities but the vital one of promoting the public safety and welfare by requiring the railroad to install warning signals at a hazardous grade crossing.

While it is no longer open to question that even in grade separation cases the cost of improvements instituted by a public body to further safety and convenience *may be* allocated all to the railroads (*Atchison*, 346 U. S. 346, 352) this Court has held that such an allocation is proper in cases involving grade crossing watchmen and signals as a legitimate exercise of legislative power in securing the public safety and that such an allocation does not violate the due process clause nor the equal protection clause of the 14th Amendment to the United States Constitution. *Chicago, Burlington &c R'd v. Chicago*, 1897, 166 U. S. 226. In the *Chicago* case this Court held that the expense to be incurred by the railroad in erecting gates and maintaining flagmen in order that the railroad be safely operated "must be regarded as incidental to the exercise of the police powers of the State." 166 U. S. 226, 255. The police power was therein described as follows:

> "The plaintiff in error took its charter subject to the power of the State to provide for the safety of the public, insofar as the safety of the lives and persons

---

[6]Page 34 of Statement as to Jurisdiction.

of the people were involved in the operation of the railroad. The company laid its tracks subject to the condition necessarily implied that their use could be so regulated by competent authority as to insure the public safety. And as all property, whether owned by private persons or by corporations, is held subject to the authority of the State to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people, it is not a condition of the exercise of that authority that the State shall indemnify the owners of the property for the damage or injury resulting from its exercise. Property thus damaged or injured is not, within the meaning of the Constitution, taken for public use, nor is the owner deprived of it without due process of law. The requirement that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the State by reasonable regulations to protect the lives and secure the safety of the people. In the recent case of *N. Y. & N. E. Railroad v. Bristol*, 151 U. S. 556, 567, this court declared it to be thoroughly established that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the States are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals." 166 U. S. 226, 252.

In the later case of *Erie R. R. Co. v. Public Util. Commrs.*, 1921, 254 U. S. 394, wherein the safety of the public was considered to require elimination of 15 grade crossings in the City of Patterson, N. J., at the sole cost of the railroad (reduced by a contribution of 10% chargeable to a street railroad), this Court held the police power of the state to be properly exercised without conflict with the commerce clause of the Constitution in the following language:

"Grade crossings call for a necessary adjustment of two conflicting interests—that of the public using the streets and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited and that it necessarily frequents, the State, in the care of which this interest is and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power, or to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires. It is said that if the same requirement were made for the other grade crossings of the road it would soon be bankrupt. That the States might be so foolish as to kill a goose that lays golden eggs for them, has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. *Denver & Rio Grande R. R. Co. v. Denver*, 250 U. S. 241, 246. To engage in interstate commerce the railroad must get on to the land and to get on to it must comply with the conditions imposed by the State for the safety of its citizens." 254 U. S. 394, 410-411.

The foregoing language is even more applicable to a grade crossing signal case than to that involving a grade

separation, as the former is wholly based on the public safety of employees and passengers of the railroad and of the persons using the street, without involving the problem of the delay of traffic as has the Appellant herein.

The State of Arizona, by its legislative action, has expressed its public policy in Section 69-228, Arizona Code Annotated, 1939, and in its successor, Section 40-336, Arizona Revised Statutes, 1956, which relate to the health and safety of the public and the railroad's employees and passengers. The commission, the Superior Court, and the Supreme Court of Arizona each found and held that the two electrically operated flashing signals were required for the health and safety of such persons. The police power of the State of Arizona was not used in any arbitrary or unreasonable manner as the railroad has suggested, but in strict compliance with the statute after two successive hearings at which evidence as to the hazardous nature of the crossing was presented.[7] Even in the

---

[7]The Supreme Court of Arizona summarized the evidence adduced in the following language:

"At the hearing the Commission received the following evidence: according to a one-week traffic count taken in May of 1956, an average of 5,329 vehicles passed over the South Cherry Avenue crossing in each 24-hour period with a high of 6,041 on Friday and a low of 3,341 on Sunday. According to an estimate made by Southern Pacific Company employees the train movements over the South Cherry Avenue crossing in a 24-hour period consist of 8 passenger trains, between 23 and 35 freight trains, and 8 to 13 switching movements—a potential total of 56 train movements a day over the crossing. Two main tracks, one eastbound and one westbound, and one spur track intersect South Cherry Avenue at an angle of approximately 53 to 54 degrees to form the South Cherry Avenue crossing. One accident occurred at this crossing in each of the years 1951, 1952 and 1953; none occurred in 1954; two, in 1955; and four accidents occurred at the crossing up to June 7 in 1956. An automobile may legally travel at 35 miles per hour over the crossing. The Southern Pacific Company voluntarily orders its employees to limit train speeds over the crossing to 20 miles per hour. At a position on the street 100 feet

Nashville case, so heavily relied upon by the railroad, this Court stated:

> "When the scope of the police power is in question the special knowledge of local conditions possessed by the state tribunals may be of great weight." 294 U. S. 405, 433.

Every presumption is to be indulged in favor of the validity of the said statute. *Gitlow v. New York*, 1925, 268 U. S. 652. Unless it is clearly unconstitutional this Court ought not to declare it so, and if there be any doubt, the validity of the statute should be sustained. *Munn v. Illinois*, 1877, 94 U. S. 113; *Euclid v. Ambler Co.*, 1926, 272 U. S. 365.

One of the traditional uses of the police power, which is one of the least limitable of governmental powers, is the protection of the safety of persons. *Queenside Hills Co. v. Saxl*, 1946, 328 U. S. 80. The language of the statute and the finding of the commission and State Courts of Arizona clearly demonstrate that Decision No. 29784 is a proper and reasonable exercise of the police power concerned only with the health and safety of persons and

---

north of the crossing, buildings limit a driver's sight distance to 180 feet east along the railroad tracks, and 213 feet west along the railroad tracks.

"At the trial the court received evidence that at a position on the street 100 feet south of the crossing a building limits a driver's sight distance to 200 feet west along the railroad tracks.

"The evidence before the trial court justified a determination by it that the South Cherry Avenue crossing is a hazardous crossing and that the public health and safety requires the protection of electrically operated flashing warning signals at the crossing. The evidence does not brand the Commission's order as unreasonable. Thus substantial evidence supports the judgment and we must affirm it unless the Commission's order is otherwise unlawful." (Appendix A of Statement as to Jurisdiction, Pages 3-4).

not in any way related to the convenience and speed of motorists upon a city street.

Where the legislature acts on a subject purely within the police power, as in this case, dealing with the health and safety of the public, a State has great latitude in determining what means are appropriate for the protection of its citizens and the 14th Amendment does not interfere with the proper exercise of the police power. *Lacoste v. Dept. of Conservation*, 1924, 263, U. S. 545. In other words, the guaranty of due process does not prevent reasonable police regulations for the protection of life and property. Likewise, where safety is concerned, even the safety of animals, the equal protection clause "• • • does not limit, nor was it designed to limit, the subjects upon which the police power of the State may be exerted. The State can now, as before, prescribe regulations for the health, good order and safety of society, and adopt such measures as will advance its interests and prosperity." *Minneapolis Railway Co. v. Beckwith*, 1889, 129 U. S. 26, 29. Nor is such an exercise of police power of the State in violation of the due process clause. *Missouri Pacific Railway Co. v. Humes*, 1885, 115 U. S. 512; *Atlantic Coast Line v. Goldsboro*, 1914, 232 U. S. 548. It is also well settled that a railroad, though established prior to a highway, can be compelled at its own expense to make a crossing safe. *Cincinnati, I. & W. Ry. v. Connersville*, 1910, 218 U. S. 336; *Atlantic Coast Line v. Goldsboro*, 1914, 232 U. S. 548; *Chi., Mil. & St. P. Ry. v. Minneapolis*, 1914, 232 U. S. 430; *Missouri Pac. Ry. v. Omaha*, 1914, 235 U. S. 121; and *Erie R. R. Co. v. Public Util. Commrs.*, 1921, 254 U. S. 394.

The Arizona statute requiring safety devices such as is now before this Court is not unique. Other states have similar statutes which place the expense of construction

and maintenance of such safety devices wholly upon the railroad.[8]

It is clear from the foregoing that:

> "As this is a question of state law *(Atlantic Coast Line v. Goldsboro,* 232 U. S. 548), we need not dwell upon it further." *Missouri Pac. Ry. v. Omaha,* 1914, 235 U. S. 121, 129.

Therefore, despite the contention of the Appellant, there is no substantial federal question involved in this appeal.

(2) THE NASHVILLE AND ATCHISON CASES

The Appellant relies heavily on the principles of the *Nashville* and *Atchison* cases. These cases are, however, not in point for the reason that, in essence, the *Nashville* case had no relation to the safety of the public and in the *Atchison* case safety was not involved either with respect to the widening of an underpass or of creating an underpass in lieu of a grade crossing where gates had been installed and were in operation. Both of these cases represent the desire of public officials to speed motor traffic through their communities and did not in any manner involve a situation such as existed in 1955 at the South Cherry Avenue grade crossing. The grade separation in the *Nashville* case was not premised upon consideration of local safety needs, but was based wholly upon general plans of the Federal and State Highway Engineers respecting the construction of a nationwide system of highways for high speed motor vehicles. 294 U. S. 405,

---

[8]See for example: Connecticut General Statutes, 1949, Ch. 261, Sec. 5541.
Idaho Code, 1947, Sec. 61-516;
Oklahoma Statutes, 1941, Title 17, Sec. 82; and
Rhode Island General Laws, 1956, Sec. 39-8-11

425. Even in the *Nashville* case the railroad agreed that the rule had long been settled that ordinarily the State may, under its police powers, impose upon a railroad the whole cost of eliminating a grade crossing, or such part thereof as it deemed appropriate (294 U. S. 405, 413), but claimed the unconstitutionality of the Tennessee statute wholly upon the special facts therein shown. In the *Nashville* case, this Court found that the purpose of the grade separation was the furtherance of uninterrupted rapid movement by motor vehicles. This is not a feature of this case here on appeal.

The *Atchison* case in part represents the widening and increasing the height of existing railroad underpasses (and thus safety at a grade crossing was not involved) and also the replacement of a grade crossing by an underpass. In this latter instance, safety of the public was not involved because the crossing had manually operated crossing gates, and but several relatively minor accidents had occurred there during the previous 25 years. 346 U. S. 346, 351. The factor governing the *Atchison* case, therefore, was to speed up city traffic, to avoid long delays by motorists, and had nothing to do with their safety at a grade crossing.

Thus, it is the contention of the Appellees that the *Nashville* and *Atchison* cases are not in point.

CONCLUSION

The Arizona statute now before this Court is, therefore, not unconstitutional as violative of Article I, Section 8 of, or Section 1 of the 14th Amendment to, the United States Constitution, nor was it unconstitutionally applied by the Arizona Corporation Commission and the State Courts of Arizona in light of the public policy of Arizona and the cases cited herein. For the foregoing reasons, it is respectfully submitted, that the judgment affirming Decision No. 29784, directing the installation and maintenance of the two electrically operated flashing signals at the South Cherry Avenue Crossing at the expense of the railroad, is no longer open to question where health, safety and the welfare of the public are concerned. Therefore, this appeal should be dismissed as it does not present a substantial federal question.

WADE CHURCH,
The Attorney General
WM. S. ANDREWS,
Asst. Attorney General
108 State Capitol
Phoenix, Arizona
Attorneys for Appellees
The Corporation Commission of the State of Arizona and its Members;
JACK G. MARKS,
City Attorney
STANLEY W. TRACHTA,
Asst. City Attorney
109 N. Meyer Avenue
Tucson, Arizona
Attorneys for Appellee
The City of Tucson

By: _____
Stanley W. Trachta